COURT OF APPEALS
DECISION
DATED AND FILED

September 4, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP2140-CR **Cir. Ct. No. 2011CF523**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANGELICA C. NELSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Eau Claire County: WILLIAM M. GABLER, SR., Judge. *Affirmed*.

Before Hoover, P.J., Mangerson and Stark, JJ.

¶1 PER CURIAM. Angelica Nelson appeals a judgment, entered upon a jury's verdict, convicting her of three counts of second-degree sexual assault of the same child. Nelson also appeals the order denying her motion for

postconviction relief. Nelson argues the trial court's refusal to allow her to testify warrants a new trial. We reject this argument and affirm the judgment and order.

BACKGROUND

¶2 An Information charged then eighteen-year-old Nelson with second-degree sexual assault of the same fourteen-year-old child on three consecutive days. The matter proceeded to trial and, after the State rested its case, Nelson thrice confirmed her desire to testify on her own behalf. During a colloquy, the court asked for the substance of Nelson's proffered testimony. Nelson indicated she would not deny that she had sexual intercourse with the child or that the child was younger than sixteen years old—she merely wanted her "side to be heard." According to defense counsel, Nelson specifically wanted to testify that she did not unbuckle the child's pants; the assaults did not happen three days in a row; and the two had no discussion about their respective ages, though they knew each other's age.

¶3 The court ultimately prohibited Nelson from testifying, noting it would be against counsel's advice and was "completely irrelevant" to the elements the State had to prove. The jury found Nelson guilty of the crimes charged. The trial court withheld sentence and imposed five years' probation. Nelson's postconviction motion for a new trial was denied and this appeal follows.

DISCUSSION

¶4 Nelson argues the trial court violated her right to testify when it concluded she was not validly waiving her privilege against self-incrimination and refused to allow her to take the stand. The State contends that even if the trial court violated Nelson's right to testify, that error is subject to a harmless-error

analysis under ***State v. Flynn***, 190 Wis. 2d 31, 56, 527 N.W.2d 343 (Ct. App. 1994). The State further asserts that any error was harmless in light of the overwhelming evidence of Nelson's guilt. We agree.

¶5 Constitutional violations are generally subject to a harmless-error analysis. ***Arizona v. Fulminante***, 499 U.S. 279, 306-07 (1991).

> Thus, a conviction will be upheld even in the face of a violation of a defendant's constitutional rights if, under the circumstances of the case, it can be shown beyond a reasonable doubt that a 'trial error' as opposed to a 'structural defect in the constitution of the trial mechanism,' did not contribute to the guilty verdict.

Flynn, 190 Wis. 2d at 56 (internal citations omitted).

¶6 Nelson contends ***Flynn*** is distinguishable because Flynn claimed ineffective assistance of trial counsel deprived him of the right to testify, while Nelson claims trial court error deprived her of the right to testify. The ***Flynn*** court applied the two-part test of ***Strickland v. Washington***, 466 U.S. 668, 687 (1984), ultimately determining that Flynn was not prejudiced by counsel's alleged deficiency. The ***Flynn*** court noted, however, that although an analysis of prejudice under ***Strickland***'s second prong is not a harmless-beyond-a-reasonable-doubt inquiry, "the two inquiries are conceptually similar." ***Flynn***, 190 Wis. 2d at 53. "Both require a balancing of, on one side, the system's need for reliable results, and, on the other side, the system's need for an end to litigation." ***Id.***

¶7 The ***Flynn*** court broadly stated:

> Although some constitutional errors that are structural defects—total deprivation of the right to counsel, trial by a biased judge, deprivation of the defendant's right to self-representation—have been held to so vitiate the jury-trial right that no harmless-error analysis is appropriate, … *the harmless-error analysis does apply to the deprivation of a defendant's right to testify*.

Id. at 56 (emphasis added). This court may not "overrule, modify or withdraw language from a previously published decision of the court of appeals." ***Cook v. Cook***, 208 Wis. 2d 166, 190, 560 N.W.2d 246 (1997). The ***Flynn*** court held that the harmless-error analysis applies to the deprivation of a defendant's right to testify, and we are bound by that precedent.

¶8 An error is harmless if it is clear beyond a reasonable doubt that the error did not contribute to the verdict. ***State v. Harris***, 2008 WI 15, ¶43, 307 Wis. 2d 555, 745 N.W.2d 397. The inquiry is case-specific, namely "not what effect the constitutional error might generally be expected to have upon a reasonable jury, but rather what effect it had upon the guilty verdict in the case at hand." ***Sullivan v. Louisiana***, 508 U.S. 275, 279 (1993).

¶9 Here, the State had to prove Nelson had sexual intercourse with the victim on three occasions and the victim was under the age of sixteen. WIS. STAT. § 948.02(2).[1] The victim testified that he and Nelson had sexual intercourse on three separate occasions behind an Altoona elementary school. The victim further testified that on the first occasion, he initially wavered on whether to have sex, recounting: "I was like because I'm 14. And she's like I know. I was like, well, it's not my fault that you're going to get in trouble and I'm not. And then she's like, oh, well, let's just do it anyway."

¶10 The victim's mother testified that after friends told her about a rumor that Nelson had sex with her son, she asked Nelson in a text message whether the rumor was true. Nelson responded: "You're going to be mad at me; but, yes, I

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

did." Nelson also indicated in a text to the victim's mother that it happened three times behind the school. When the victim's mother told Nelson it was inappropriate, Nelson responded: "I know there's laws, but he's hot and I'm sorry." The victim's mother reported the assaults to the police.

¶11 Police officer Dana Brown testified that when she arrived at the victim's home, she viewed the text message exchange and heard a phone conversation between Nelson and the victim's mother in which Nelson admitted having sex with the victim. Police officer Scott Kelley testified that during an interview with Nelson, she admitted that she had sex with the victim three times behind the school, and that she knew he was fourteen years old.

¶12 It is clear beyond a reasonable doubt that the trial court's error in refusing to allow Nelson's testimony did not contribute to the verdict. Nelson indicated she would not dispute the elements of the offenses, but wanted to challenge testimony that the assaults occurred on three consecutive days, that she unbuckled the victim's pants and that the two discussed their respective ages. Any impact this testimony may have had on the State's case would have been insignificant in light of the overwhelming evidence of Nelson's guilt.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.